[Cite as *New Holland v. Murphy*, 2021-Ohio-2671.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
PICKAWAY COUNTY

VILLAGE OF NEW HOLLAND, :
: Case No. 19CA32
Plaintiff-Appellee, :
:
v. : DECISION AND JUDGMENT ENTRY
:
MICHAEL J. MURPHY, :
:
Defendant-Appellant. :

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APPEARANCES:

James R. Kingsley, Kingsley Law Office, Circleville, Ohio, for Appellant.

Jack D'Aurora and John M. Gonzales, The Behal Law Group LLC, Columbus, Ohio, for Appellee.

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Smith, P.J.

{¶1} This is an appeal from a Pickaway County Court of Common Pleas post-remand judgment entry granting Appellee, Village of New Holland's, motion for a permanent injunction seeking to enjoin Appellant, Michael Murphy, from operating an automotive repair business from his residence in violation of the village's zoning ordinances. On appeal, Appellant contends that 1) the trial court committed prejudicial error when it denied him a de novo hearing upon remand by depriving him of the right to present additional evidence and arguments; 2) the trial court committed

prejudicial error when it found equitable estoppel defenses did not apply; and 3) the trial court committed prejudicial error when it found laches did not apply.

{¶2} Because we find no merit to any of the assignments of error raised by Murphy, they are all overruled. Accordingly, the judgment of the trial court is affirmed.

FACTS

{¶3} In our prior consideration of this matter, we set forth the following pertinent facts:

> On August 30, 2017, Appellant, Village of New Holland, filed a complaint for injunction against Appellee, Michael Murphy. Appellee's wife was later joined as a party to the lawsuit. The complaint alleged Appellant was entitled to a permanent injunction pursuant to R.C. 713.13 barring Appellees from operating a business on their property, which was located in a residential district. The complaint further alleged that Appellees had "applied for and received a purported 'conditional use permit' for the property" on January 30, 2002, but that the conditional use permit (hereinafter "CUP") did not specify that Appellees were permitted to run a business on their residential property. Appellants further alleged that Appellees' business, which involves the repair of lawn and garden equipment and tractors, was a prohibited use on residential property, and that a variance, as opposed to a CUP, would have been required under the zoning code. Appellants alleged further deficiencies in the process that resulted in the issuance of the purported CUP, however, as those issues are not pertinent to our disposition on appeal, we do not include them. Appellant thereafter filed a motion for a preliminary and permanent injunction, the basis of which

appeared to be increased wear and tear and road damage the village attributed to heavy equipment being driven to and from Appellees' business. Appellees' position regarding the basis for the request for the injunction was that Appellant could not use zoning ordinances to enforce weight restrictions on streets.

Appellees filed an answer asserting multiple defenses and a general denial of the allegations of the complaint. During the course of the litigation, Appellees filed an exhibit, which was a document entitled "Conditional Use Permit On Property Of Michael Murphy And Ruth Murphy." The document specified it applied to Appellees' residential address, which was zoned "R1 & R2[,]" single family homes and two family homes, respectively. The document was signed by four members of the zoning board and was dated January 30, 2002.

The matter eventually proceeded to a bench trial. Various witnesses testified, including several of Appellees' neighbors and then-members of the zoning board, regarding their recollections as to when Appellees initially obtained the purported CUP back in 2002. Because most of this witness testimony relates to the deficiencies regarding the issuance of the purported CUP, as alleged in the complaint and which we have ultimately determined not to be pertinent to this appeal, we do not include it here. Of importance to the within matter, however, Mr. Murphy testified at trial. Of relevance, he testified that he was actually a member of the zoning board at the time he applied for the CUP in 2002. He testified that he recused himself from the meeting and did not vote on his application. He testified he believed he had been granted a CUP that permitted him to both build a new garage on his residential property, and to also conduct his repair business from that garage. Importantly, he testified that he was unaware if a resolution was ever passed granting him a CUP and he was unable to produce any evidence indicating a resolution had been passed. He further testified that he had applied for the CUP so that he could

> downsize his existing business and relocate it to his residential property. He further testified that as a result of the issuance of the CUP, he was issued a building permit, which led to him to build an additional garage on his residential property. He testified that his repair business is currently his only source of income.
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> Clair Betzco, Jr., mayor of the village, testified on behalf of Appellant. He testified that despite a thorough search, the only document he could find regarding the CUP at issue was the document filed by Appellees, as referenced above. He stated he found it in the village administrator's filing cabinet in an unmarked folder in 2017, but that it should have been in the clerk's office in a filing cabinet marked "Permit Uses." Incidentally, there was testimony introduced at trial indicating Mr. Murphy may have actually served as Village Administrator in 2002. Mavis Yourchuck, Village Clerk, also testified for Appellant. She testified that she physically handed Mr. Murphy the document purporting to be a conditional use permit. She also testified, however, that council meeting minutes from February 11, 2002, just twelve days after the CUP was purportedly issued, indicated the CUP was stopped.
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> After hearing the trial testimony and considering post-trial arguments submitted by the parties, the trial court ultimately issued a decision denying Appellant's request for a permanent injunction. It is from that judgment that Appellant now brings its timely appeal, setting forth two assignments of error for our review.

*Village of New Holland v. Murphy*, 4th Dist. Pickaway No. 18CA6, 2019-Ohio-2423, ¶ 3-7.

{¶4} This Court ultimately found merit to both assignments of error raised by the Village in the first appeal, finding that the trial court erred by applying the wrong standard of review as well as the wrong burden of proof.

*Id.* at ¶ 30. More specifically, we found that the trial court erred in handling the matter as if it was an administrative appeal, rather than simply as an initial request for an injunction based upon a statutory violation. *Id.* at ¶ 20. In conducting a de novo review of the trial court's order for legal error, we determined that the Village was prejudiced by the trial court's presumption throughout its decision that the CUP at issue was, in fact, valid. *Id.* We further found that the zoning ordinance at issue required a resolution to be passed in connection with the issuance of a CUP and that because no resolution was passed, the CUP was actually invalid. *Id.* As such, we reversed the judgment of the trial court and remanded the matter for the limited purpose of having the trial court apply the correct standard of review and the correct burden of proof. *Id.* at ¶ 30.

{¶5} On remand, it appears Murphy believed he was entitled to present additional evidence and raise new legal arguments, and as a result, he filed a motion for an oral hearing. The trial court denied this request and instead entered judgment in favor of the Village, finding in accordance with this Court's decision that there was no resolution ever passed finalizing the CUP and therefore that the CUP was never valid or final. Murphy filed a proffer of the evidence he claimed he was entitled to present, and also filed an appeal to this Court. This matter is now before us for a second time, this

time as a result of an appeal filed by Murphy, rather than the Village. On appeal, Murphy raises three assignments of error for our review, as follows.

ASSIGNMENTS OF ERROR

I. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR WHEN IT DENIED APPELLANT A DE NOVO HEARING UPON REMAND BY DEPRIVING APPELLANT OF THE RIGHT TO PRESENT ADDITIONAL EVIDENCE AND ARGUMENTS.

II. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR WHEN IT FOUND EQUITABLE ESTOPPEL DEFENSES DO NOT APPLY.

III. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR WHEN IT FOUND LACHES DID NOT APPLY.

ASSIGNMENT OF ERROR I

{¶6} In his first assignment of error, Murphy contends the trial court committed prejudicial error when it denied him a de novo hearing upon remand by depriving him of the right to present additional evidence and arguments. He raises multiple arguments under this assignment of error, as follows: 1) "[t]he trial judge mistakenly believed that he was bound by the erroneous law of the case"; 2) "[t]he lack of a Zoning Appeals Board resolution is not fatal"; 3) "Village Council minutes were ultra vires"; 4) "[i]f not ultra vires, there was no resolution staying/adopting or denying the

CUP or it was conditional without further action"; and 5) Appellant was the target of illegal, unlawful selective zoning enforcement to enforce a road weight limit dispute." The State responds by arguing that Murphy's first four arguments raised under this assignment of error simply reflect his attempt to have the trial court decide a question of law on remand that this Court had already decided in the first appeal. The State further contends that Murphy's fifth argument, which argues he was the target of selective zoning enforcement, constitutes an affirmative defense that was never raised at the trial court level and was thus waived.

{¶7} We agree with the State's assessment that the first four arguments raised under this assignment of error directly challenge the correctness of this Court's rulings in the first appeal of this matter. Murphy contends that certain rulings made by this Court—regarding the validity of the CUP and the fact that a resolution was required to finalize the CUP—were clearly erroneous and, as such, the trial court had the discretion or the duty to disregard those rulings and to allow him to present additional evidence and arguments—in essence, to have a second trial. We find no merit to Murphy's arguments.

{¶8} In *Giancola v. Azem*, 153 Ohio St.3d 594, 2018-Ohio-1694, 109 N.E.3d 1194, the Supreme Court of Ohio recently examined the law-of-the-case doctrine in Ohio and observed as follows:

> The law-of-the-case doctrine has long existed in Ohio jurisprudence. " '[T]he doctrine provides that the decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels.' " (Brackets sic.) *Hopkins v. Dyer*, 104 Ohio St.3d 461, 2004-Ohio-6769, 820 N.E.2d 329, ¶ 15, quoting *Nolan* [*v. Nolan*], 11 Ohio St.3d [1], [] 3, 462 N.E.2d 410. "The doctrine is necessary to ensure consistency of results in a case, to avoid endless litigation by settling the issues, and to preserve the structure of superior and inferior courts as designed by the Ohio Constitution." *Id.*
>
> Although the law-of-the-case doctrine generally is "a rule of practice rather than a binding rule of substantive law," *Nolan* at 3, 462 N.E.2d 410, we have also explained that "the Ohio Constitution 'does not grant to a court of common pleas jurisdiction to review a prior mandate of a court of appeals.' " *State ex rel. Cordray v. Marshall*, 123 Ohio St.3d 229, 2009-Ohio-4986, 915 N.E.2d 633, ¶ 32, quoting *State ex rel. Potain v. Mathews*, 59 Ohio St.2d 29, 32, 391 N.E.2d 343 (1979). The doctrine therefore "functions to compel trial courts to follow the mandates of reviewing courts," *Nolan* at 3, 462 N.E.2d 410, and "[a]bsent extraordinary circumstances, such as an intervening decision by the Supreme Court, an inferior court has no discretion to disregard the mandate of a superior court in a prior appeal in the same case," [*I*]*d*. at the syllabus.
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> Accordingly, a trial court is without authority to extend or vary the mandate issued by a superior court, *id.* at 4, 462 N.E.2d 410, and "where at a rehearing following remand a trial court is confronted with substantially the same facts

> and issues as were involved in the prior appeal, the court is bound to adhere to the appellate court's determination of the applicable law," [*I*]*d.* at 3, 462 N.E.2d 410.

*Giancola* at ¶ 14-16.

{¶9} The *Giancola* Court further explained that the question of whether a court properly applied the law-of-the-case-doctrine constitutes a question of law that is reviewed de novo. *Id.* at ¶ 13.

{¶10} The record here indicates that this matter originated with the filing of a complaint for an injunction based upon a zoning violation. The matter was not decided upon summary judgment, but rather, a full trial to the court was held. Thus, the trial court's original judgment was issued after both parties had the full opportunity to present all of their evidence and make all of their legal arguments. The questions presented in the first appeal of this matter were purely legal questions, which required a de novo review. *Village of New Holland*, *supra*, at ¶ 9. Our decision issued in that matter resulted in a limited remand to the trial court with specific instructions. *Id.* at ¶ 2. More specifically, the matter was remanded to the trial court "to apply the correct standard of review, based upon the correct burden of proof." *Id.* at ¶ 30. As such, in light of the fact that this matter was remanded to the trial court after a full trial had been concluded, and also in light of our limited remand order, which simply ordered the trial court to

apply the correct standard of review and burden of proof, there was no basis for the trial court to allow Murphy to present additional evidence or raise new legal arguments. Thus, the trial court would have exceeded the scope of the remand order by allowing the presentation of additional evidence and arguments. Further, because this Court had already determined that the CUP was invalid because a resolution had never been passed, and that the Village's zoning ordinance required the passage of a resolution for the issuance of a CUP, the trial court would have violated the law of the case by deciding otherwise, as urged by Murphy. Therefore, upon de novo review, we conclude the trial court correctly applied the law-of-the-case doctrine. Accordingly, we find no merit to Murphy's arguments one through four under this assignment of error.

{¶11} Additionally, we note that we agree with the State's position that to the extent Murphy was dissatisfied with this Court's prior ruling, or believed that this Court erred in rendering its decision, his recourse was to appeal the decision to the Supreme Court of Ohio, not to seek correction at the trial court level. Murphy also had the right to file an App.R. 26(A) motion for reconsideration if he believed this Court either did not consider, or did not fully consider, a particular issue. However, Murphy neither filed an appeal nor sought reconsideration from this Court's decision. Instead,

rather than availing himself of the remedies that were available to him, he sought to present additional evidence and arguments at the trial court level, and now seeks an opinion from this Court that the trial court erred in failing to find that this Court's decision was "clearly erroneous." Such action is not the appropriate course for obtaining the relief Murphy requests and we decline to entertain Murphy's argument that this Court erred in its prior analysis of this matter.

{¶12} In his fifth argument under this assignment of error, Murphy contends that he "was the target of illegal, unlawful selective zoning enforcement to enforce a road weight limit dispute." Murphy argues that the Village was attempting "to prevent his customers from driving over village streets," while "grain trucks" and "trash haulers" are not prohibited from driving on the streets. Murphy argues that this amounts to selective enforcement that constitutes a violation of his equal protection rights. He further argues that if this Court finds that a resolution was required in order for the CUP to be valid, then every CUP ever granted by the Village "is invalid and there is selective enforcement * * *." As set forth above, the State contends that selective zoning enforcement is an affirmative defense that was never raised at the trial court level and thus was waived.

{¶13} A review of the record reveals that although Murphy did not raise selective enforcement as an affirmative defense in either his answer or his amended answer, he did raise the issue in his memorandum contra to injunction. In that memorandum, he argued that he was guaranteed the right of due process and equal protection under the U.S. Constitution and that while the Village can restrict the weight of vehicles on all village streets, "it cannot single out a particular vehicle or a business []." Thus, assuming arguendo that Murphy may have preserved this issue by raising it in his memorandum contra, we nevertheless find that it lacks merit.

{¶14} The elements of the defense of selective enforcement/prosecution have been explained as follows:

> In order to support a defense of selective prosecution, "a defendant bears the heavy burden of establishing, at least prima facie, (1) that, while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution, and (2) that the government's discriminatory selection of him for prosecution has been invidious or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights. These two essential elements are sometimes referred to as 'intentional and purposeful discrimination.' " *State v. Flynt* (1980), 63 Ohio St.2d 132, 134, 407 N.E.2d 15 (citations omitted).
>
> "A mere showing that another person similarly situated was not prosecuted is not enough; a defendant must demonstrate actual discrimination due to invidious

> motives or bad faith." *State v. Freeman* (1985), 20 Ohio St.3d 55, 58, 485 N.E.2d 1043. Nor does "the conscious exercise of some selectivity in enforcing a statute fair on its face * * * in and of itself amount to a constitutional violation." *Whitehall v. Moling* (1987), 40 Ohio App.3d 66, 69, 532 N.E.2d 184 (citation omitted).

*Ghindia v. Buckeye Land Dev., L.L.C.*, 11th Dist. Trumbull No., 2007-Ohio-779, ¶ 42-43.

{¶15} Here, it is clear from the record that Murphy failed to establish a prima facie case of selective enforcement. Murphy argues that the board of zoning appeals has historically never passed resolutions in connection with the issuance of CUPs. He further argues that as a result, all previously issued CUPs were invalid as well, not just his CUP. Therefore, he contends that because those landowners had not been prosecuted, and because he had been prosecuted, that he was the target of selective zoning enforcement. However, there was no evidence introduced at trial to substantiate this allegation. For instance, there was no evidence introduced regarding other CUPs that were granted to other property owners or what process was or was not used in the issuance of the CUPs.

{¶16} Moreover, although Murphy alleged that the Village was attempting to regulate weight limits on his street but had not imposed limits on other streets, there was no evidence introduced to substantiate this allegation either. Further, Murphy did not introduce evidence regarding any

other specific property owner similarly situated to himself that was conducting activities in violation of the zoning ordinance that the Village failed to order to cease and desist. Furthermore, even if he had, he has failed to demonstrate that the Village's alleged discriminatory selection of him for prosecution was based upon such impermissible considerations such as race, religion, or a desire to prevent him from exercising his constitutional rights. Thus, the trial court did not err by failing to find at the conclusion of trial that the zoning ordinance was selectively enforced as against Murphy.

{¶17} As mentioned above, the trial court initially found in favor of Murphy on the merits without resorting to a balancing of the equities and without having to determine whether the defense of selective enforcement applied. When the Village appealed the trial court's judgment, Murphy could have filed a cross-appeal and argued that the trial court should have found that selective enforcement was present. However, he did not. On remand, the trial court entered judgment in favor of the Village, finding that equitable defenses did not apply. The trial court's judgment was silent on the issue of selective enforcement and thus, it presumably did not conclude that selective enforcement had been proven. Based upon the record before us, we cannot conclude that the trial court erred in failing to find that Murphy was the target of selective enforcement.

{¶18} Accordingly, having found no merit in any of the arguments raised under Murphy's first assignment of error, it is overruled.

ASSIGNMENTS OF ERROR II AND III

{¶19} Because Murphy's second and third assignments of error are related, and for ease of analysis, we address them together. In his second assignment of error, Murphy contends the trial court committed prejudicial error when it found equitable estoppel defenses did not apply. He raises two arguments under this assignment. First, he argues that "[z]oning can be a taking entitling one to compensation[.]" In furtherance of this argument, he contends that one acting in good faith reliance on a CUP "by making a substantial investment in erecting a building on the property acquires a vested right in the continue [sic] permitted use of that property in a manner that complies with the conditions of the CUP and its revocation entitles his [sic] to an injunction to reinstate and to damages." He further contends that "* * * governmental immunity is not a defense to inverse condemnation protected by the takings clauses of the US and Ohio constitutions * * *." Second, Murphy argues that a municipality is estopped from enforcing/revoking the issuance of a CUP when the Zoning Appeals Board was authorized to do so and the issuance of it was not illegal at the time. He contends that the general rule that the doctrines of equitable estoppel and

promissory estoppel are inapplicable against a political subdivision when the political subdivision is engaged in a governmental function "is unconstitutional as applied to zoning * * *." Finally, he contends that "[t]he fact that [he] spent a large amount of money, relies solely upon the business and has offended no one but the mayor for 15 years should rule the day."

{¶20} In his third assignment of error, Murphy contends the trial court committed prejudicial error when it found laches did not apply. He argues that "[l]aches is not barred by governmental immunity." In support of his argument, he relies on *State ex rel. Casale v. McLean*, 58 Ohio St.3d 163, 569 N.E.2d 475 (1991), which involved a zoning inspector's claim that the doctrine of laches barred the issuance of a zoning certificate for a variance to a mobile home park owner because his delay in acting on a previously granted variance resulted in a disadvantage to the township. Relying on the fact that the equitable defense of laches was at issue in *State ex rel. Casale*, Murphy argues that "[i]f the government can claim laches, so can the landowner."

{¶21} The State contends that Murphy should have, but did not, argue the applicability of equitable defenses during the course of the first appeal and that he is barred from doing so now. The State also argues that, contrary to Murphy's position, the equitable defenses of laches and estoppel do not

apply in zoning cases. The State also points out that Murphy failed to raise any issue at trial concerning a taking and that even if he had, because the CUP was never finalized, Murphy "was in violation of zoning ordinances from the first day he began doing commercial work on his residential property."

{¶22} We initially note that we agree with the State's contention that because Murphy failed to allege or argue a taking below, he cannot raise that argument for the first time now. It is well-settled that a party may not raise any new issues or legal theories for the first time on appeal. *Stores Realty Co. v. Cleveland*, 41 Ohio St.2d 41, 43, 322 N.E.2d 629 (1975). Thus, a litigant who fails to raise an argument before the trial court forfeits the right to raise that issue on appeal. *Independence v. Office of the Cuyahoga Cty. Executive*, 142 Ohio St.3d 125, 2014-Ohio-4650, 28 N.E.3d 1182, ¶ 30 (stating that "an appellant generally may not raise an argument on appeal that the appellant has not raised in the lower courts"); *State v. Quarterman*, 140 Ohio St.3d 464, 2014-Ohio-4034, 19 N.E.3d 900, ¶ 21 (explaining that defendant forfeited his constitutional challenge by failing to raise it during trial court proceedings); *Gibson v. Meadow Gold Dairy*, 88 Ohio St.3d 201, 204, 724 N.E.2d 787 (2000) (concluding that party waived arguments for purposes of appeal when party failed to raise those arguments during trial

court proceedings); *State ex rel. Gutierrez v. Trumbull Cty. Bd. of Elections*, 65 Ohio St.3d 175, 177, 602 N.E.2d 622 (1992) (explaining that an appellant cannot "present * * * new arguments for the first time on appeal"). *Accord State ex rel. Jeffers v. Athens Cty. Commrs.*, 4th Dist. Athens No. 15CA27, 2016-Ohio-8119, fn.3 (stating that "[i]t is well-settled that failure to raise an argument in the trial court results in waiver of the argument for purposes of appeal"); *State v. Anderson*, 4th Dist. Washington No. 15CA28, 2016-Ohio-2704, ¶ 24 (explaining that "arguments not presented in the trial court are deemed to be waived and may not be raised for the first time on appeal").

{¶23} Appellate courts may, however, consider a forfeited argument using a plain-error analysis. *See Risner v. Ohio Dept. of Nat. Resources*, Ohio Div. of Wildlife, 144 Ohio St.3d 278, 2015-Ohio-3731, 42 N.E.3d 718, ¶ 27 (stating that reviewing court has discretion to consider forfeited constitutional challenges). *See also Hill v. Urbana*, 79 Ohio St.3d 130, 133-134, 679 N.E.2d 1109 (1997), citing *In re M.D.*, 38 Ohio St.3d 149, 527 N.E.2d 286, syllabus (1988) (stating that "[e]ven where waiver is clear, [appellate] court[s] reserve[ ] the right to consider constitutional challenges to the application of statutes in specific cases of plain error or where the rights and interests involved may warrant it"). The plain error doctrine is not, however, readily invoked in civil cases. *Matter of P.L.B.*, 4th Dist.

Lawrence No. 18CA19, 2019-Ohio-1056, ¶ 39. Instead, an appellate court "must proceed with the utmost caution" when applying the plain error doctrine in civil cases. *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 121, 679 N.E.2d 1099 (1997). Additionally, "[t]he plain error doctrine should never be applied to reverse a civil judgment * * * to allow litigation of issues which could easily have been raised and determined in the initial trial." *Id.* at 122. Moreover, because Murphy has not presented an argument that the trial court plainly erred by failing to conclude that the zoning issue in this matter constituted a taking of his property, we will not consider the issue. *Matter of P.L.B.*, *supra*, at ¶ 40, citing *Matter of K.W.*, 2018-Ohio-1933, 111 N.E.3d 368, ¶ 94 (refusing to consider plain error when litigant fails to argue it); *Wilson v. Farahay*, 4th Dist. Adams No. 14CA994, 2015-Ohio-2509, ¶ 34. *Accord State v. Arnold*, 9th Dist. Summit No. 24400, 2009-Ohio-2108, ¶ 8 ("[T]his Court will not construct a claim of plain error on a defendant's behalf if the defendant fails to argue plain error on appeal").

{¶24} With respect to Murphy's claim of equitable estoppel and laches, we note that the trial court originally granted judgment in favor of Murphy without expressly reaching the merits of whether the equitable defenses of equitable estoppel and laches applied. Instead, the trial court found that the conditional use permit was valid and that Murphy was entitled

to carry on with his home business, without resorting to a balancing of the equities. Thus, the trial court did not reach the question of the applicability of the equitable defenses raised by Murphy. The Village appealed that decision and although Murphy did not file a cross-appeal, this Court addressed the question of the proper standard of review and burden of proof when reviewing a grant or denial of a permanent injunction, as opposed to the grant or denial of statutory injunction, which is presently at issue. *Village of New Holland* at ¶ 29 (explaining that when requesting a statutory injunction, it is not necessary to prove by clear and convincing evidence that the injunction is necessary to prevent irreparable harm or that there is no adequate remedy at law). Under these circumstances, we do not believe that Murphy waived the right to now argue the applicability of these defenses in the present appeal. However, despite Murphy's right to raise his argument that the equitable defenses of estoppel and laches apply to this matter, based upon the following, we find no merit in his argument.

{¶25} " 'Equitable estoppel prevents relief when one party induces another to believe certain facts exist and the other party changes his position in reasonable reliance on those facts to his detriment.' " *Doe v. Archdiocese of Cincinnati*, 116 Ohio St.3d 538, 2008-Ohio-67, 880 N.E.2d 892, ¶ 7, quoting *State ex rel. Chavis v. Sycamore City School Dist. Bd. of Edn.*, 71

Ohio St.3d 26, 34, 641 N.E.2d 188 (1994). Furthermore, "[e]quitable estoppel usually requires actual or constructive fraud." *See State ex rel. Shisler v. Ohio Pub. Emps. Retirement Sys.*, 122 Ohio St.3d 148, 2009-Ohio-2522, 909 N.E.2d 610, ¶ 28. Laches is an equitable doctrine that has been defined as " 'an omission to assert a right for an unreasonable and unexplained length of time, under circumstances prejudicial to the adverse party.' " *Connin v. Bailey*, 15 Ohio St.3d 34, 35, 472 N.E.2d 328 (1984), quoting *Smith v. Smith*, 107 Ohio App. 440, 443, 146 N.E.2d 454 (1957), affirmed, 168 Ohio St. 447, 156 N.E.2d 113 (1959). To successfully invoke the doctrine of laches, the party invoking it must establish by a preponderance of the evidence the following four elements: (1) unreasonable delay or lapse of time in asserting a right; (2) absence of an excuse for the delay; (3) knowledge, actual or constructive, of the injury or wrong; and (4) prejudice to the other party. *State ex rel. Meyers v. Columbus*, 71 Ohio St.3d 603, 605, 646 N.E.2d 173 (1995). Delay in asserting a right does not, without more, establish laches. Rather, the person invoking the doctrine must show that the delay caused material prejudice. *Connin, supra*, 35-36; *Smith*, paragraph three of the syllabus. *See also Black Diamond Coal Co. v. Buckeye Petroleum Co., Inc.*, 4th Dist. Athens No. CA-1271, 1986 WL 12952, *3 (Nov. 17, 1986) (finding no material

prejudice existed to warrant the defense of laches to claims for royalty payments in oil and gas lease).

{¶26} However, as this Court observed in our prior consideration of this matter:

> "To obtain a permanent injunction, the plaintiff must demonstrate a right to relief under any applicable substantive law." *Office of Scioto Township Zoning Inspector, v. Puckett*, 2015-Ohio-1444, 31 N.E.3d 1254, ¶28; citing *Island Express Boat Lines, Ltd. v. Put–in–Bay Boat Line Co.*, 6th Dist. Erie No. E–06–002, 2007-Ohio-1041, ¶93. "Additionally, the plaintiff must ordinarily prove, by clear and convincing evidence, that the injunction is necessary to prevent irreparable harm and that the plaintiff does not have an adequate remedy at law." *Id.* (Emphasis added). However, "*[i]t is established law in Ohio that, when a statute grants a specific injunctive remedy to an individual or to the state, the party requesting the injunction 'need not aver and show, as under ordinary rules in equity, that great or irreparable injury is about to be done for which he has no adequate remedy at law * * *.' "* *Puckett* at ¶ 28[,] quoting *Ackerman v. Tri-City Geriatric & Health Care, Inc.*, 55 Ohio St.2d 51, 56, 378 N.E.2d 145 (1978)[,] quoting *Stephan v. Daniels*, 27 Ohio St. 527, 536 (1875). " 'Therefore, statutory injunctions should issue if the statutory requirements are fulfilled.' " Puckett at ¶ 28[,] quoting *Columbus Steel Castings Co. v. King Tool Co.*, 10th Dist. Franklin Nos. 11AP-351 & 11AP-355, 2011-Ohio-6826, ¶ 66[,] citing *Ackerman* at 57.

*Village of New Holland v. Murphy* at ¶ 26. (Emphasis added).

{¶27} Furthermore, as noted by the Ninth District Court of Appeals in reference to the Supreme Court's decision in *Ackerman*, *supra*:

> the Supreme Court acknowledged the position that the traditional balancing of equities is unnecessary in a situation in which an injunctive remedy is sought pursuant to a statute that serves the purpose of providing a governmental agent with the means to enforce public policy.

*City of Wooster v. Entertainment One, Inc.*, 158 Ohio App.3d 161, 2004-Ohio-3846, 814 N.E.2d 521, ¶ 68, citing *Ackerman*, *supra*, at 56.

{¶28} The *Wooster* court further observed as follows:

> * * * Ohio courts have expressed the clear position that equitable defenses generally do not apply to bar a claim made by a governmental unit. *See generally, Halluer v. Emigh* (1992), 81 Ohio App.3d 312, 318, 610 N.E.2d 1092 (stating the principles of estoppel and the equitable defense of laches generally do not apply against the state or its agents). *See also, State ex rel. Chester Twp. Bd. of Trustees v. Makowski* (1984), 12 Ohio St.3d 94, 96, 12 OBR 82, 465 N.E.2d 453, and *Richfield v. Nagy* (Mar. 5, 1986), 9th Dist. No. 12300, 1986 WL 2914 (recognizing that the equitable defense of laches generally does not apply against the government to bar a claim). Similarly, the equitable doctrine of clean hands should not apply to bar a governmental unit's claim, and certainly should not serve to stifle a government's ability to defend the public interest and to protect it from proscribed behavior. *See Ackerman*, 55 Ohio St.2d at 57, 9 O.O.3d 62, 378 N.E.2d 145.

*City of Wooster*, *supra*, at ¶ 69. *See also State v. Tri-State Group, Inc.*, 7th Dist. Belmont No. 03BE61, 2004-Ohio-4441, ¶ 57-60 (explaining in detail why courts are “loathe to apply” the equitable defenses of laches, estoppel and waiver to governmental entities, and noting that

the relevant question in whether to apply the doctrine of laches "is not whether the State is trying to enforce a public or private right," but instead "whether applying that doctrine serves any public policy interest and whether that interest outweighs the public policy interest against applying that doctrine").

{¶29} Although Murphy argues that the prohibition of the application of equitable defenses to the government does not apply in zoning cases, *City of Wooster v. Entertainment One, Inc.* involved the city's enactment of amendments to its zoning code and an argument that the amendments affected a landowner's use of his real property. *City of Wooster* at ¶ 2. Additionally, "[s]ome Ohio courts have applied the *Ackerman* rationale to claims by governmental agents under R.C. 519.24 and similar statutes involving county or municipal zoning." *Fiore v. Larger*, 2nd Dist. Montgomery Nos. 05-CV-6054, 07-CV-8371, 2009-Ohio-5408, ¶ 21, citing *Baker v. Blevins*, 162 Ohio App.3d 258, 833 N.E.2d 327, 2005-Ohio-3664 and *City of Wooster*, *supra*, at 68-69 (balancing of equities is unnecessary where injunctive relief is sought pursuant to a statute that provides a governmental agent with the means to enforce public policy; equitable defenses are generally inapplicable to bar a claim by the government); *State ex rel. Scadden v. Willhite*, 10th Dist. No. 01AP-800, 2002-Ohio-1352.

Thus, in light of the foregoing, we cannot conclude that the trial court committed prejudicial error when it found the equitable defenses of estoppel and laches did not apply in this case.

{¶30} Additionally, we note that implicit in Murphy's argument that "[a] municipality is estopped from enforcing/revoking the issuance of a CUP when the Zoning Appeals Board was authorized to do so and the issuance of it was not illegal at the time[,]" is the idea that the Village of New Holland Zoning Appeals Board was, in fact, authorized to issue Murphy a CUP to operate an automotive repair garage from his residence, which is located in a R-1/R-2 residential district. However, for the following reasons, we reject this implication.

{¶31} A review of the record indicates that Murphy's residence and the garage at issue are both located in an R-1/R-2 residential district. "The law is well settled that [a] city [or in this case, a village] has the power to regulate residential districts in order to control the use of the residential property." *City of Madiera v. Furtner*, 1st Dist. Hamilton No. C-930317, 1994 WL 362088, *4, citing *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114 (1926) and R.C. 713.07. As stated in *City of Madiera*, "[t]his power includes regulation concerning home occupations." *City of Madiera*

at *4, citing *State ex rel. Vielhauer v. Leighton*, 111 Ohio App. 227, 171 N.E.2d 748 (1959).

{¶32} Murphy claims that the Board of Zoning Appeals had authority to issue him a CUP to operate an automotive repair garage from his home at the time the permit was purportedly issued. He bases this claim, in part, on his argument that his automotive repair garage constituted an "essential service" under the zoning plan. For instance, in his statement of facts Murphy states that "[a] conditional use permit for essential services was allowed in a residential district." Murphy is not incorrect in that statement, as Section 15.14 of the zoning ordinance is entitled "Essential Services" and provides that "[e]ssential services shall be permitted as authorized and regulated by law and other ordinances of the Village, it being the intention hereof to exempt such essential services from the application of this Ordinance." Furthermore, Article 20 of the of the zoning ordinance, which is entitled "R-1 Single-Family Residence District," sets forth the principal permitted uses in R-1 Districts, which include essential services. For example, paragraph 20.005, which falls under Article 20 of the zoning ordinance, states that "Essential Services: As defined in Paragraph 13.24[]" are a "principal permitted use." However, paragraph 13.24 of the zoning ordinance defines "essential services" as follows:

> The erection, construction, alteration, or maintenance, by public utilities or municipal or other governmental agencies, of underground or overhead gas, electrical, steam or water transmission or distribution systems, collection, communication, supply or disposal systems, including poles, wires, drains, sewers, pipes, conduits, cables, fire alarm boxes, police call boxes, traffic signals, hydrants, and other similar equipment and accessories and connection therewith; reasonably necessary for the furnishing of adequate service by such public utilities or municipal or other governmental agencies or for the public health or safety or general welfare, but not including buildings.

{¶33} Thus, "essential services" include only public-works-type projects or services provided by municipalities or governmental agencies, and the definition expressly excludes "buildings." There is no way to interpret this provision to allow the erection of a garage for the operation of an automotive repair business by a private individual in a residential district. Furthermore, the idea that the zoning board's passage of a vote to allow the conditional use permit to be granted constituted a "resolution" within the contemplation of the ordinance fails because a zoning board only has the authority to grant conditional uses provided for in the zoning resolution. *See Homan v. Franklin Township Board of Zoning Appeals*, 3rd Dist. Mercer No. 10-18-04, 2018-Ohio-3717, ¶ 31 ("It is well established that 'township board[s] of zoning appeals may grant conditional use zoning permits, *but only if* such uses are provided for in the township's zoning resolution")

(Emphasis sic.), citing *Genovese v. Beckham*, 9th Dist. Summit No. 22814, 2006-Ohio-1174, ¶ 10, in turn citing *Gerzeny v. Richfield Tp.*, 62 Ohio St.2d 339, 344, 405 N.E.2d 1034.

{¶34} The operation of an automotive repair garage does not qualify as an essential service under the zoning ordinance. Moreover, although the zoning ordinance does permit certain home occupations as conditional uses in R-2 residential districts, an automotive repair garage is not one of the permitted conditional uses. For instance, Article 21, which is entitled "R-2 One and Two-Family Residence District," provides for "conditionally permitted uses" in section 21.01. Section 21.021 allows for "Professional Offices," such as an office for a "physician, dentist, artist, lawyer, engineer, teacher, architect, or other member of a recognized profession, but not including beauty parlors, barber shops, schools of any kind with organized classes or similar activity[.]" Thus, an automotive repair garage is not a conditionally permitted use in either an R-1 or R-2 residential district. Because an automotive repair garage did not constitute an essential service and because it did not qualify as a conditionally permitted use in a residential district, the board of zoning appeals lacked authority to grant Murphy a conditional use permit for such a use. *See Homan*, *supra*. Additionally, and importantly, Article 60 of the zoning ordinance governs

"Enforcement" and provides in paragraph 60.00, in pertinent part, as follows:

> * * * All departments, officials and public employees of New Holland vested with the duty or authority to issue permits or licenses shall conform to the provisions of this Ordinance and shall issue no permit or license for any use, building or purpose in conflict with the provisions of this Ordinance. *Any permit or license, issued in conflict with the provisions of this Ordinance shall be null and void.* (Emphasis added).

{¶35} Thus, despite the fact that Murphy was given a document purporting to be a valid CUP, per the express language contained in the ordinance, because the operation of an automotive repair garage was not an essential service and was not a permitted conditional use in a residential district, the board not only lacked authority to grant the CUP, but the permit purportedly issued to Murphy was null and void, as it conflicted with the provisions of the ordinance. As a result, even if Murphy's defense of equitable estoppel were viable, it fails on the merits.

{¶36} Having found no merit to the arguments raised under Murphy's second and third assignments of error, they are overruled. Accordingly, because we have likewise found no merit to the arguments raised under Murphy's first assignment of error, the judgment of the trial court is affirmed.

**JUDGMENT AFFIRMED.**

**JUDGMENT ENTRY**

It is ordered that the JUDGMENT BE AFFIRMED and that the Appellant shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Pickaway County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Wilkin, J., Concurs in Judgment and Opinion.
Abele, J., Dissents.

For the Court,

_____________________________
Jason P. Smith,
Presiding Judge

**NOTICE TO COUNSEL**

**Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.**